FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Paul Poister, Executive Vice President
Partnership for America
400 N Capitol Street, Suite 216
Washington, D.C. 20001

DEC 3 0 2008

RE: MUR 6010

Dear Mr. Poister:

On May 19, 2008, the Federal Election Commission notified you of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). On December 18, 2008, the Commission found, on the basis of the information in the complaint, and information provided by Partnership for America and McClintock for Congress, that there is no reason to believe that Partnership for America violated 2 U.S.C. §§ 441a(a)(1), 441b, 433 or 434. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, are enclosed for your information.

If you have any questions, please contact Tracey L. Ligon, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

Stephen A. Gura
Deputy Associate General Counsel
for Enforcement

Enclosures
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

Respondent: Partnership for America **MUR:** 6010

I. INTRODUCTION

This matter arises out of a complaint alleging that Tom McClintock and his campaign committee, McClintock for Congress and David Bauer, in his official capacity as Treasurer, coordinated with Partnership for America in the making of expenditures in connection with Mr. McClintock's primary election on June 3, 2008. As a result of the alleged coordination, the complaint alleges that Partnership for America made excessive and prohibited campaign contributions, and read broadly, that Partnership for America is a political committee that failed to register and report its contributions, in violation of the Federal Election Campaign Act of 1971, as amended ("the Act").

II. FACTUAL AND LEGAL ANALYSIS

Tom McClintock is a California state senator and the 2008 Republican nominee for the House of Representatives for California's Fourth Congressional District. Partnership for America is a nonprofit corporation organized under 26 U.S.C. § 501(c)(4) and headquartered in Colorado. It is "comprised of Americans who support public policies that seek to restore a common sense balance between economic growth and environmental conservation." *See* http://www.partnershipforamerica.org. The organization's stated goals are to create "environmentally sound development" and "access to affordable and reliable supplies of goods," and to boost "economic growth" through job creation. *See* http://www.partnershipforamerica.org/about/whatwebelieve.asp.

The complaint alleges that Tom McClintock and Partnership for America engaged in coordinated communications by funding an "illegal independent expenditure and/or issue advocacy 'campaign'" to influence the outcome of the June 3, 2008 Republican primary election. Complaint at 2 and Exh. A. Specifically, the complaint asserts that an individual named Steven J. Ding promoted and solicited funds for Partnership for America's campaign by e-mail and at a meeting of Indian gaming tribes at the same time he was a paid "employee/consultant" of the McClintock committee.[1] *See id.* at 4 and Exhs. A, C. By contrast, the article attached to the complaint states that Mr. Ding "was on McClintock's campaign payroll until a few weeks" before the meeting. Complaint Exh. B (David Whitney, McClintock Independent Campaign Effort Questioned, The Sacramento Bee, Apr. 26, 2008, available at http://www.sacbee.com/111/story/891275.html). The complaint attaches a three-page document entitled, "CA-4 CONGRESSIONAL ISSUE ADVOCACY CAMPAIGN," that, according to the complaint, was prepared and distributed by Partnership for America through its agent, Mr. Ding. *See id.* at Exh. A. The document states that Partnership for America "is launching a campaign to highlight certain issue positions [of] the candidates in the Fourth District of CA," proposes a timeline of activities and a budget of $660,000 for the primary campaign, and describes its strategy and purpose as follows:

> We will aim to create a political environment by which the most conservative candidate's messages on taxes, economic development; gun rights; immigration, and other key issues will lead to higher turnout among like minded people who care about those issues. That, in turn, will create a better scenario for the conservative candidate (who is aligned with our

[1] By contrast, the article attached to the complaint states that Mr. Ding "was on McClintock's campaign payroll until a few weeks" before the meeting. Complaint Exh. B (David Whitney, *McClintock Independent Campaign Effort Questioned*, THE SACRAMENTO BEE, Apr. 26, 2008, *available at* http://www.sacbee.com/111/story/891275.html).

beliefs) to achieve victory in the primary as well as the general election in November.

Id. at Exh. A. According to the complaint, Mr. McClintock frequently touted himself in communications as "the most conservative" candidate in the primary election. *See id.* at 4.

In response, Partnership for America asserts that the complaint is based on "erroneous" information. Specifically, Partnership for America states that while it did prepare a draft plan for an education effort "to highlight the candidates' positions on key issues... this draft plan was never funded, initiated, acted upon, or the subject of any communications to voters in the [F]ourth [D]istrict of California." Partnership for America Response at 1. In addition, Partnership for America asserts that it made no attempt to run an "independent expenditure" effort for or against any candidate in California's Fourth Congressional district and that it made no public communications related to the candidates in that election. PFA does not address whether the draft plan was created or distributed by Mr. Ding. However, it asserts that Mr. Ding is not an employee, agent, or representative of PFA. Press reports and the organization's website corroborates the response, as they contain no information suggesting that Partnership for America aired communications related to this race. Thus, because it never approved or acted upon the draft plan in any way, Partnership for America argues that it could not have violated the coordination rules or exceeded spending limits.

A. Alleged Coordination and Resulting Violations

The allegations in this matter raise the question of whether Partnership for America made excessive and prohibited in-kind contributions in the form of coordinated communications in violation of 2 U.S.C. §§ 441a(a)(1) and 441b. Under the Act, no

person may make a contribution, including an in-kind contribution, to a candidate and his or her authorized political committee with respect to any election for Federal office, which, in the aggregate, exceeds $2,300. 2 U.S.C. § 441a(a). In addition, the Act prohibits direct and in-kind contributions by corporations. *See* 2 U.S.C. § 441b; *see also* 11 C.F.R. § 114.10(d)(3). The Act defines in-kind contributions as, *inter alia*, expenditures made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. § 441a(a)(7)(B)(i). A communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three-part test:[2] (1) payment by a third-party; (2) satisfaction of one of four "content" standards;[3] and (3) satisfaction of one of six "conduct" standards.[4] *See* 11 C.F.R.

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[2] After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Appeals Court affirmed the District Court's invalidation of the fourth, or "public communication," content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission's content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. *See Shays v. F.E.C.*, 508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (NO. CIV.A. 06-1247 (CKK)) (granting in part and denying part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. 2008). This decision does not impact this matter, however, because there is no information that any communication was funded by Partnership For America.

[3] The content prong is satisfied if the communications at issue meet at least one of four content standards: (1) a communication that is an electioneering communication as defined in 11 C.F.R. § 100.29(a); (2) a public communication that republishes, disseminates, or distributes candidate campaign materials; (3) a public communication containing express advocacy; or (4) a public communication, in relevant part, that refers to a clearly identified federal candidate, is publicly distributed or disseminated 120 days or fewer before a primary or general election, and is directed to voters in the jurisdiction of the clearly identified candidate. *See* 11 C.F.R. § 109.21(c).

[4] The conduct prong is satisfied when any of the following types of conduct occurs: (1) the communication was created, produced, or distributed at the request or suggestion of a candidate or his campaign; (2) the candidate or his campaign was materially involved in decisions regarding the communication; (3) the communication was created, produced, or distributed after substantial discussions with the campaign or its agents; (4) the parties contracted with or employed a common vendor that used or conveyed material information about the campaign's plans, projects, activities, or needs, or used material

§ 109.21.

In this matter, there is no specific information that Partnership for America ever paid for or made a communication sufficient to satisfy the payment prong at 11 C.F.R. § 109.21(a)(1) or the content standard under 11 C.F.R. § 109.21(c). The only information regarding possible communications by Partnership for America is a vague statement found in its "CA-4 Congressional Issue Advocacy Campaign" memo that "[a]ccording to the 'timeline,' research activities were to be commenced in April and it has been reported that a telephone survey has been conducted within the district and presumed to be paid for by Partnership for America." Partnership for America specifically countered this claim in its response, asserting that it never approved or acted upon the draft plan at issue in any way, and that it received no funds from its membership to fund any actions related to the candidates in the congressional election in the Fourth District of California.

While Partnership for America's response does not provide affidavits or other supporting materials, publicly-available information corroborates its claim that it did not fund such communications. Specifically, Partnership for America's website includes no information suggesting that Partnership for America made expenditures on behalf of Mr. McClintock, and no news articles report communications funded by Partnership for America in the Fourth District. Therefore, based upon the information presented, there is no reason to believe that Partnership for America violated 2 U.S.C. §§ 441a(a)(1) or 441b by making excessive or prohibited contributions in the form of coordinated communications.

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information gained from past work with the candidate to create, produce, or distribute the communication; (5) the payor employed a former employee or independent contractor of the candidate who used or conveyed material information about the campaign's plans, projects, activities, or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; or (6) the payor republished campaign material. *See* 11 C.F.R. § 109.21(d).

B. Political Committee Status

The complaint also asserts that Partnership for America should have registered and reported as a political committee because it intended to engage in activity aimed at influencing the outcome of federal elections. *See* 2. U.S.C. §§ 431(4), 433(a) and 434(a). The Act defines a "political committee" as any committee, club, association, or other group of persons that receives "contributions" or makes "expenditures" for the purpose of influencing a federal election that aggregate in excess of $1,000 during a calendar year. 2 U.S.C. § 431(4)(A). The term "expenditure" is defined to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal Office." 2 U.S.C. § 431(9)(A)(i). The term "contribution" is defined to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Further, Commission regulations provide that funds received in response to any communication are contributions to the person making the communication "if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. § 100.57.[5]

To address overbreadth concerns, the Supreme Court has held that only organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) ("*MCFL*"). The

[5] The Act also prohibits a corporate entity from making any expenditure in connection with a federal election. 2 U.S.C. § 441b(a). As a nonprofit corporation registered with the Internal Revenue Service ("IRS"), therefore, Partnership For America is prohibited from making expenditures. *See* 2 U.S.C. § 441b(a).

Commission has long applied the Court's major purpose test in determining whether an organization is a "political committee" under the Act, and it interprets that test as limited to organizations whose major purpose is federal campaign activity. *See* Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597, 5601 (Feb. 7, 2007); *see also* FEC's Mem. in Support of Second Mot. for Summ. J., *Emily's List v. FEC*, Civ. No. 05-0049 at 21 (D.D.C. Oct. 9, 2007). An organization's "major purpose" may be established through public statements of its purpose. *See, e.g.*, *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004) (court found organization evidenced its "major purpose" through its own materials which stated the organization's goal of supporting the election of Republican Party candidates for federal office and through efforts to get prospective donors to consider supporting federal candidates); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("organization's [major] purpose may be evidenced by its public statements of its purpose or by other means. . . ."). An organization can also satisfy the "major purpose" test through sufficient spending on campaign activity. *MCFL*, 479 U.S. at 262-264 (political committee status would be conferred on MCFL if its independent spending were to become so extensive that the group's major purpose may be regarded as campaign activity).

Based on the complaint, response from Partnership for America, and publicly-available sources, there is no information that Partnership for America made expenditures or received contributions meeting the $1,000 threshold. The complaint states that Partnership for America was preparing to engage in a $660,000 "independent expenditure effort" in the Fourth District of California's Republican primary. However, while Partnership for America acknowledged in its response that it had created a "draft plan"

for an "education effort," it stated that the draft plan was never "funded, initiated, acted upon, or the subject of any communications to voters." There is also no information that Partnership for America ran any advertisements, and the group's website contains no references to federal candidates or requests for funds to run ads to help federal candidates. IRS filings by Partnership for America also show no disbursements suggesting that Partnership for America made "expenditures."

Similarly, there is no information suggesting that Partnership for America received contributions exceeding $1,000. Although Partnership for America apparently solicited funds for its "draft plan," it asserts that it received no funds from its membership or new members "to fund ANY actions related the candidates in the CA-4." Partnership for America Response at 2. The Commission has no information suggesting otherwise. In addition, its website reveals no solicitations indicating that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate. *See* Partnership for America: Join Us!, *at* http://www.partnershipforthewest.org/registration/default.asp (last visited Nov. 3, 2008). As a result, the available information indicates that Partnership for America did not accept "contributions" under the Act.

Therefore, because Partnership for America has not met the statutory threshold for political committee status, it is not necessary to consider the major purpose test. Accordingly, there is no reason to believe that Partnership for America violated 2 U.S.C. §§ 433 and 434.

III. CONCLUSION

Based on the foregoing, there is no reason to believe that Partnership for America violated 2 U.S.C. §§ 441a(a)(1), 441b, or 433 and 434.